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Issue **NEWSLETTER – May 2014**

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News

- Nathan Crystal awarded **Leadership in Law by SC Lawyers Weekly**, which honors those in the SC legal community who have achieved success in their law practice, made contributions to society and had an important impact on the legal industry. Charleston, SC, March 13, 2014

- Nathan Crystal appointed to the **New York City Bar Ethics Advisory Committee**

Recent publications:

- Nathan Crystal, *Technology and Ethics ("Technethics") – 2013 in Review*, South Carolina Lawyer 14 (March 2014)
- Nathan Crystal, *Criticism of Judges,* South Carolina Lawyer 9 (January 2014)
- Nathan M. Crystal & Francesca Giannoni-Crystal, "*One, No One and One Hundred Thousand" … Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration*, 32 Miss. C.L. Rev. 283 (2013)
- Nathan Crystal, *Solving the Problem of the Insurance Defense Triangle,* South Carolina Lawyer 9 (November 2013)
- Nathan Crystal, *Communications with law Firm In-House Counsel: Does the Privilege Apply?*, South Carolina Lawyer 11 (September 2013)
- Nathan M. Crystal & Francesca Giannoni-Crystal, *Deterrents to Forum Selection Clause Challenges*, International Litigation Articles, ABA (June 25, 2013)

Contact info@nathancrystal.com if you want a copy.

Speaking engagements and materials:

- Nathan Crystal and Francesca Giannoni Crystal spoke at the program organized by the International Committee of the South Carolina Bar at the Annual Meeting of the SC Bar in Kiawah January 2014 "*Fortune brings in some boats that are not steered*" … *but generally planning ahead is better: let's discuss some notarization issues in cross borders transactions and some ethics issues in International Law*.
- Francesca Giannoni-Crystal spoke at the Symposium "*Getting around the cloud(s) – "Technical and legal issues on Cloud services*" at the Scuola Superiore Sant'Anna (Pisa-Italy), November 30, 2013
- Nathan Crystal spoke at the program "*Issues in Comparative Ethics*", November 19, 2013 at the New York City Bar, NY.

- Nathan Crystal spoke at "*Recent Developments in Professional Ethics*", inside the Annual Free Ethics CLE, November 1, 2013, organized by the Richland County Bar in Columbia, SC at the auditorium of USC Law School.

Material available from all the programs - contact info@nathancrystal.com.

Technethics™ - www.technethics.com

We have developed of a website aimed at becoming a leading source of information on the intersection of ethics/privacy and technology. It consists of: (1) A fully searchable data base (currently free) of primary and secondary material (2) A community of users committed to understanding, resolving, and promoting ethical practices in the use of technology in the practice of law. The community includes a technology blog and news service with important developments in the field (3) A training platform, now in its early stages of development, that will consist of free videos, paid videos, webinars, and special training programs by agreement with law firm and other organizations. **We invite comments**.

Join our **LinkedIn discussion group "Nathan Crystal on Ethics"**

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ETHICS

AROUND THE COUNTRY

New Florida advertising rules

On January 31, 2013, the Florida Supreme Court issued new rules on lawyer advertising. One of the most significant aspects of the new rules is that all statements by attorneys must be "objectively verifiable." In addition, the new rules apply to all forms of lawyer advertising, regardless of whether the information was sought on request, as is the case with websites, social networking, or video sharing sites. All advertisements (other than websites) must be filed 20 days before their planned use unless they are exempt. The Florida Bar Board of Governors has issued guidelines on a number of issues. Lawyers in other states who advertise in national media can avoid application of the Florida rules if they include a disclaimer "cases not accepted in Florida." The rules also do not apply to website advertisements if they do not offer the services of a Florida bar member, a lawyer located in Florida, or a lawyer offering to provide services in Florida. Rule 4-7 (comments).

SOUTH CAROLINA

(Some) electronic transfers from lawyer trust accounts allowed

On April 10, 2014 (Appellate Case No. 2014-000261) the South Carolina Supreme Court adopted a portion of a recommendation from the Bar which allow some electronic transfer from a trust account: "In order to pay recording fees, submission fees, filing fees, or similar fees on behalf of a client or third party, a lawyer may authorize the electronic transfer of funds from the lawyer's trust account to a government agency or a vendor duly authorized by a government agency to collect such fees." Full text at http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-04-10-01.

Matching services - Ethics Advisory Opinion 14-01

The Committee was asked to opine on the ethical propriety of following arrangement: potential client pays a fee to a group XYZ which acts as an attorney matching service for family court matters. XYZ pays $800 to attorney to consult with the client, and attend one hearing. Thereafter, the attorney is to bill the client at his/her normal hourly rate. Attorney knows, before taking the case, that further legal services will be required for a typical retainer of $ 2,500.00. XYZ requires that the attorney sign a contract for services that prevents discussing with clients the particulars of the agreement, including payment, between attorney and XYZ. The Committee opined that this arrangement is not proper based on Rule 1.8(f). Attorney cannot enter into this agreement with XYZ because XYZ would be a third party payor and when a third party pays attorneys fee an attorney is required to obtain informed consent from the client pursuant to Rule 1.8(f). Because here attorney is unable to obtain the client's informed consent because of the non-disclosure provision contained in the agreement with XYZ, attorney cannot ethically accept this arrangement. In addition, as clear from Comment 12 to Rule 1.8, these types of fee arrangement may create a conflict of interest (Rule 1.7). Full opinion at http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleID/1810.aspx

Attorney who relied on another attorney's title search that failed to discover unpaid taxes, not liable per se in malpractice

Plaintiff Amber Johnson retained attorney Mario Inglese to close a real estate transaction. Inglese contracted with attorney Charles Feeley to perform a title search on the property. Because Inglese was unable to conduct the closing, attorney Stanley Alexander acted as the closing attorney. Alexander paid Inglese for Feeley's report, which indicated that all taxes due on the property had been paid. However, this was not the case and the Charleston County delinquent tax collector seized the property from Anderson and sold it. Johnson sued Alexander, Inglese, and Inglese's law firm. The circuit court granted Johnson's motion for summary judgment against Alexander, "finding Alexander was negligent in not ensuring good and marketable title because he (or his agent) failed to determine that public records showed the delinquent taxes on the property." The SC Court of Appeals reversed, finding that Alexander was not liable as a matter of law:

> Alexander … did not perform the title search. To determine Alexander's liability, the issue is not whether a reasonable attorney conducting a title search on the property would have found the information, but whether Alexander acted reasonably under the existing circumstances in relying on the title search performed by Feeley … For Alexander to be liable … his reliance on Feeley, or his decision not to do the title search himself, must have been negligent. As to Alexander's liability, Johnson was not entitled to summary judgment.

As for Alexander being liable because Feeley was Alexander's agent – which fact Johnson alleges – the Court found that "the circuit court did not grant partial summary judgment on the basis of agency. Though the circuit court made a reference to Feeley being Alexander's agent, the court made no findings as to whether Johnson established the elements of agency as a matter of law." *Johnson v Alexander, Inglese, and Mario S. Inglese, P.C*, Opinion No. 5208, March 19, 2014. Full text at http://sccourts.org/opinions/HTMLFiles/COA/5208.pdf

NEW YORK

An attorney retained by the executor to represent him in a contested accounting proceeding, owes no duty to the estate and beneficiaries, absent a showing of fraud and collusion. However, the attorney must disgorge the fees that were paid by the estate because his services were adverse and not beneficial to the estate.

On April 16, 2014 4/16/14, in *Betz v Blatt*, the Appellate Division of the Supreme Court of New York (Second Dep't) reversed the lower's court denial of defendants' motion to dismiss a legal malpractice and a breach of fiduciary duty actions because "[a]bsent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence." On the other hand, contrary to lower court's decision, the court found that the because the attorneys did not represent the estate, the legal fees paid by the estate should be disgorged. Debra Betz (plaintiff) and her sister Christina Carbone-Lopez were the daughters of decedent's Carmelo Carbone and beneficiaries of his will. Mike Carbone, their uncle was the executor of the state but was removed for cause. Plaintiff brought an action against the attorneys who "represented Carbone in the contested probate proceedings," seeking to recover "damages for legal malpractice". The lower court denied the motion to dismiss the legal malpractice / breach of fiduciary duty and grant the motion to dismiss the disgorgement of fees action. Both parties appealed. Because "the retainer agreement and the facts … indicate that the … defendants were retained solely to defend Carbone in the contested accounting proceeding" the Appellate Division reversed the Supreme Court's finding that the defendants represented the executor *and* the estate and had therefore a "duty of undivided loyalty to the Estate and its

beneficiaries." The court held that "the documentary evidence demonstrates that the … defendants were not in privity with the estate, and … the plaintiff failed to plead specific facts tending to show' fraud or collusion," therefore the actions for legal malpractice action and breach of fiduciary duty must be dismissed. However, the court found that plaintiff had a viable claim for restitution and the disgorgement of fees because "defendants' fees for representing Carbone were paid from estate assets even though those services were not beneficial to the estate and were, in fact, adverse to it." Full decision of *Betz v. Blatt* available at http://www.courts.state.ny.us/reporter/3dseries/2014/2014_02554.htm

New York City Bar approves Report providing guidance to lawyers in using cloud computing services

The New York City Bar (Committee on Small Law Firm) approves the Report "The Cloud and the Small Law Firm: Business, Ethics, and Privilege Considerations"/ November 2013. The Report notes the ethical duties implicated by these risks: competency (ABA Model Rule 1.1), communication (Rule 1.4), confidentiality (Rule 1.6), Maintenance, preservation and delivery of client property on termination (Rules 1.15 and 1.16), and supervision (Rule 5.3). Of particular note is the ABA's addition to Rule 1.1 of comment 8, which now states: "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." The Report concludes with eight suggested guidelines for lawyers considering use of a cloud services. I found particularly useful Guideline 4, which deals with key contractual terms in service level agreements that lawyers should carefully review before employing a cloud service provider. The Report concludes "Go Forth, with Care." See more on this on Technethics (http://www.technethics.com/blog/new-york-city-bar-approves-report-providing-guidance-to-lawyers-in-using-cloud-computing-services/) For the full text of the report, see http://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf.

Recent New York State Bar Association opinions (selected):

Ethics Opinion 1000 (March 28, 2014)- "Payment of Legal Fees by a Non-Client Whose Interests Could Be Adverse to the Lawyer's Client": "It is permissible for a third-party to pay for a lawyer's representation of a client where the client's interests may be adverse to the interests of the third-party payer if: 1) the lawyer obtains the informed consent of the lawyer's client and 2) the lawyer exercises independent professional judgment on the client's behalf without interference from the potentially adverse third-party payer. That the lawyer may be owed additional fees from the client does not pose a conflict unless the outstanding debt interferes with the lawyer's ability to represent the client." Full opinion at https://www.nysba.org/CustomTemplates/Content.aspx?id=48086

Ethics Opinion 1004 (April 1, 2014) – "Attorney's Obligations Regarding Excessive Fee of Counter-Party's Attorney": "Where a contract provides that one party pay the counter-party's attorney's fee and that fee is excessive, the attorney for the first party is not ethically prohibited from participating in the transaction. Whether the attorney has an obligation to report the excessive fee of another attorney depends on the circumstances." Full opinion at https://www.nysba.org/CustomTemplates/Content.aspx?id=48092

Ethics Opinion 1005 (April 2, 2014) - "Whether using the phrases "I KNOW HOW TO WIN FOR YOU" or "unsurpassed litigation skills," violates Rule 7.1: "Neither the statement "I KNOW HOW TO WIN FOR YOU" or "unsurpassed litigation skills" in lawyer advertising is permissible under Rule 7.1 because the statements are misleading, and neither statement can be factually supported as of the date on which it is disseminated." Full opinion at https://www.nysba.org/CustomTemplates/Content.aspx?id=48093

Opinion 998 (February 5, 2014) – "Confidential information; criminal conduct": "Lawyers who become aware of fraudulent conduct by buyer and seller in a real estate transaction, including delivery of a fraudulent check in payment of the fee of buyer's lawyer, may not disclose attempted or completed fraud unless necessary to withdraw a representation by the lawyer still

being relied upon; to the extent necessary to collect the fee; or where required by other law." Full opinion at https://www.nysba.org/CustomTemplates/Content.aspx?id=47389

INTERNATIONAL

Ethics Guidelines for Party Representation in International Arbitration

In May 2013, the International Bar Association adopted the IBA Guidelines on Party Representation in International Arbitration. The guidelines were drafted to the benefit of practitioners representing parties in international arbitration. Usually International arbitrators and counsels are subject to diverse and potentially conflicting rules and norms. Classic example of this situation is the one of choosing which documents to produce or how to prepare witness when the arbitration concerns lawyers handling disputes involving multiple jurisdictions. See full text of IBA Guidelines on Party Representation in International Arbitration (2013).

[On this topic, see also Nathan & Francesca Giannoni-Crystal, "One, No Once and One Hundred Thousand" … which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration, 32 Miss. C.L. Rev. 283 (2013). Abstract at https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=32+Miss.+C.+L.+Rev.+283&srctype=smi&srcid=3B15&key=398a871d6a4a7e38e402c297994b1827. Contact us for a copy.]

ETHICS AND TECHNOLOGY - CHECK OUT at: http://www.technethics.com/news/

CONTRACTS

SOUTH CAROLINA

If in consideration of taking a life insurance for the benefit of a university, the university grants you the right to purchase sport event tickets, the addition by the university of a seat license fee is a unilateral (and impermissible) contract modification

In 1990 George M. Lee, III entered into an agreement with the University of South Carolina (USC) and the University Gamecock Club ("GC") pursuant to which in exchange for Lee "purchasing a $100,000 life insurance policy and naming the University the sole, irrevocable beneficiary of the policy", Lee was given the "'opportunity to purchase tickets for his lifetime to University football and basketball games." The agreement stated: "George M. Lee, III[,] will have the opportunity to purchase tickets entitled to the Gamecock Level or membership presently held." After 8 eights, the Gamecock Club notified to Lee that some more contribution was needed and Lee "began paying $500 a year to maintain his Lifetime Full Scholarship status and the accompanying benefits." In 2008 USC instituted a program that required all GC members, "to pay a seat license fee [YES] as a prerequisite for purchasing season tickets" so that Lee "was required to pay $325 per year for each of his eight seats in order to maintain his seating at football games. Lee has paid this license fee under protest since the institution of the YES program." Lee sought a declatory judgment based on breach of contract. The trial court found for USC and GC: because the required seat license fees did not deprive Lee "of the opportunity to purchase season tickets." Applying principles of contract interpretation, the Supreme Court agreed with the lower court that the agreement is unambiguous in granting Lee the opportunity to buy tickets but unlike the lower court it held that "the Agreement contains no limitations or conditions on this contractual right. Thus, by requiring Lee to pay the seat license fee before purchasing season tickets, the University has attempted to impose an additional term that the parties did not agree upon. This unilateral modification is impermissible. "Once [a] bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration."

Layman v. State, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006). The Court held that USC and GC "are required by the terms of the Agreement to permit Lee the opportunity to purchase tickets without being subject to any other conditions, including the payment of seat license fees." Justice Pleicones dissented stating that he was "unable to find any language prohibiting additional fees [in the agreement]" *Lee v University of South Carolina and University Gamecock Club*, Opinion No. 27372 (April 2, 2014) Full opinion at http://www.sccourts.org/opinions/HTMLFiles/SC/27372.pdf

A family member exclusion in an out-of- state auto insurance contract does not violate SC public policy based on the abolition of parental immunity

According to SC Supreme Court, a Florida automobile insurance policy's family exclusion does not violate SC public policy. A car accident occurred in SC in which a mother was the at-fault driver and her son the injured passenger. The car was registered in Florida and insured under a policy issued in Florida, but the driver testified that the car had been driven in SC for several years. Green (the father), representing his injured son, filed for a declaratory judgment to determine coverage under the policy. The insurance declined coverage for the child's injuries under the family member exclusion ("*There is no coverage for [Bodily Injury] for which a covered person becomes legally responsible to pay to a member of that covered person's family residing in that covered person's household*") Applying Florida law, the circuit court granted summary judgment for the insurance. On appeal, Green argued that as a matter of public policy, SC courts should refuse to recognize the validity of the exclusion "*because South Carolina has abolished parental immunity, [therefore]enforcement of the family member exclusion violates public policy*". The SC Supreme Court held that, here it "*is not the question of a common law immunity from suit but rather the enforceability of a contract provision. …. The abolition of parental immunity in this State does not create a public policy bar to enforcement of the valid family member exclusion".* The Supreme Court affirmed the summary judgment: "*the family member exclusion contained in the automobile at issue here, being valid under both Florida statutory authority and Florida public policy considerations, is not void as against our public policy when applied in this South Carolina litigation*." Full decision at http://www.sccourts.org/opinions/HTMLFiles/SC/27373.pdf (*Green v. United States Automobile Association Auto and Property Insurance Company*)

NEW YORK

Damage award in a criminal case domesticated in NY

On April 1, 2014, a New York state appellate court found that a foreign criminal judgment ordering the payment of damage to victims could be domesticated under Article 53 of the N.Y. (Uniform Foreign Money Judgments Act). *Harvardsky Prumyslovy Holding, A.S.,-V Likvidaci v. Kozeny*, N.Y.S.2d ---, 2014 WL 1281527, 2014 N.Y. Slip Op. 02250 (1st Dep't Apr. 1, 2014).
This was a 2010 judgment of the Municipal Court in Prague that convicted a Czech citizen for gross fraud in connection with the privatization of formerly state-owned companies and sentenced him to incarceration. The judgment also directed him to pay compensation for over US$400 million to victims (a fund). The fund sued in the Supreme Court of the State of New York, New York County seeking recognition of the judgment to attach funds that the Czech citizen – via a company secretly owned – owned in New York. The Supreme Court denied the attachment because the judgment was penal. On appeal the Appellate Division reversed.
Noting that the case was of first impression, the Court stated that preliminary they had to decide whether the judgment could be considered a "foreign country judgment" under CPLR 5301(b), which defines a "foreign country judgment" as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." The central question was whether the judgment for compensation to crime victims was a "penalty", so that it was excluded from the possibility of domestication. The defendant's position was the award of damages to victims was compensatory if rendered by a civil court while it was a penalty if rendered by a criminal court but the Court disagreed: which court issued the judgment is irrelevant under CPLR article 53 because, on one hand "there are any number of civil proceedings in which the compensation recoverable by

the victim may constitute a penalty" on the other hand, "the statutory basis for denying enforcement is predicted on the classification and purpose of the judgment, not the court that issued it." The Court added that allowing the enforcement here was consistent with the purpose of the statute, which was "to promote reciprocal treatment for New York judgments in foreign courts by providing a statutory basis to reflect New York's liberal treatment of foreign judgment" while the purpose would not be promoted "by the refusal to recognize a foreign judgment based on some contrived criterion, which may then prompt foreign courts to deny enforcement to similar New York judgments." The Court reversed the lower court's granting of defendant's motion to dismiss, and the denial of plaintiff's motion for attachment and granted the motion for attachment.

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